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No. 387

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944

UNION DIME SAVINGS BANK,

Petitioner,

*against*

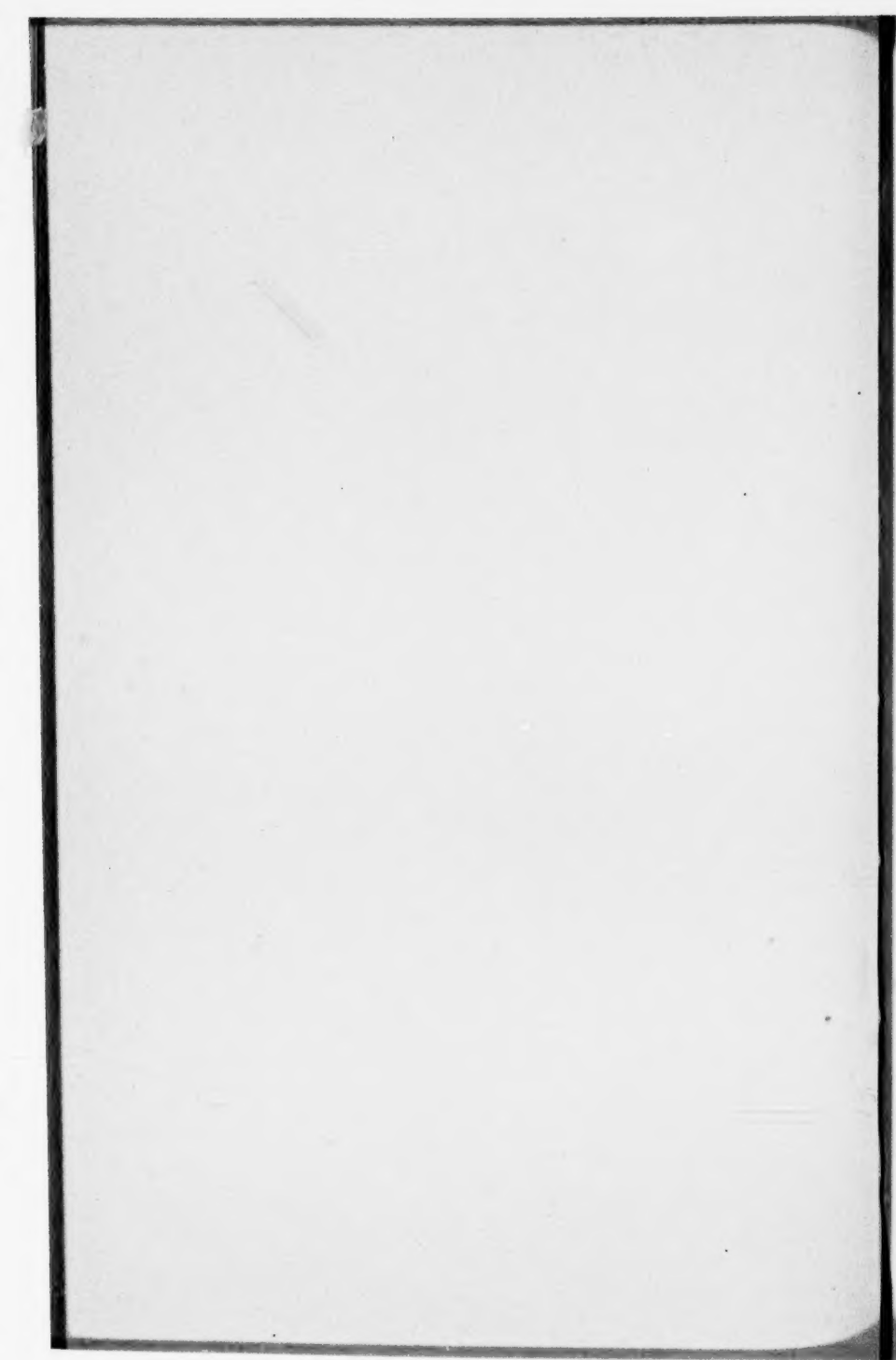
IRA ADAMS, CLIFFORD GREGORY, CECIL HUNT, JACK PIZZITOLA  
and LEONARDO RATCLIFFE,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO BE  
ADDRESSED TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

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## INDEX

	PAGE
Parties and History of the Proceedings .....	2
Jurisdiction .....	4
Facts as Established by the Findings .....	5
Questions Presented .....	8
Reasons in Support of Petition .....	9
Conclusion .....	13

### CITATIONS.

#### *Cases:*

Borella v. The Borden Company, — F. (2d) — (C. C. A. 2d, Decided July 28, 1944) .....	12
Fleming v. Arsenal Building Corporation, 125 F. (2d) 278 .....	11
Greenberg v. Arsenal Building Corp. and Spear & Co. Inc., — F. (2d) — (C. C. A. 2d, decided July 18, 1944) .....	12
Kirschbaum v. Walling, 316 U. S. 517 .....	3, 11
Overnight Motor Transportation Co. v. Missel, 316 U. S. 572, 581 .....	10, 11
Rucker v. First National Bank, 138 F. (2d) 699. Cer- tiorari denied, 321 U. S. 769, .....	12
Warren-Bradshaw Co. v. Hall, 317 U. S. 88 .....	10, 11

#### *Statutes:*

Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201, et seq.) .....	2
Judicial Code, Sec. 240 .....	4



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Respondents.

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Comes now Union Dime Savings Bank, your petitioner, by Robert R. Bruce, as counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Honorable United States Circuit Court of Appeals for the Second Circuit require said Court to certify and remove to this Court for its review and determination, a certain cause lately pending in said Court, wherein your petitioner was defendant-appellant and Ira Adams and other persons named therein were plaintiffs-appellees, and to that end your petitioner now tenders herewith its petition with a certified copy of the record in said cause.

ROBERT R. BRUCE,  
Counsel for Petitioner.

**PETITION FOR A WRIT OF CERTIORARI TO BE  
ADDRESSED TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

Your petitioner, Union Dime Savings Bank, respectfully shows to this Court as follows:

**Parties and History of the Proceedings**

1. Petitioner is a savings bank and a corporation duly organized and existing under the laws of the State of New York and maintains its place of business in the City, County and State of New York.

2. Respondents were employed by petitioner as elevator operators and in other capacities as building service employees at various times between October 24, 1938 and February 26, 1942, in two loft buildings owned by petitioner and located in the Borough of Manhattan, New York City. Petitioner originally acquired both loft buildings thru foreclosure of mortgages held by it as investments and carried on none of its functions as a savings bank in these buildings.

3. Respondents commenced this action on July 22, 1942, in the United States District Court for the Southern District of New York under Section 16(b) of the Fair Labor Standard Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. Sec. 201, et seq.) to recover overtime wages allegedly due under Section 7(a) of that Act for their respective periods of employment by petitioner between October 24, 1938, effective date of the Act, and February 26, 1942, together with liquidated damages of an equal amount, attorneys' fees and costs.

4. Petitioner's answer denied that respondents were covered by the Act and, in addition, pleaded several affirmative defenses and an equitable counterclaim predi-

ated upon the fact that respondents' entire employment had been governed by collective bargaining agreements between the parties and upon the conduct of respondents under those agreements. In brief, the affirmative defenses were (1) payment based upon a construction of the collective agreements in compliance with the Act; (2) estoppel against respondents' complete claim; (3) estoppel against respondents' claim for liquidated damages, attorneys fees and costs alone; (4) unconstitutionality of Section 16(b) of the Act for want of due process if recovery of liquidated damages were permitted under all the circumstances of this case; (5) right to arbitrate respondents' claims; and finally (6) a counterclaim for reformation of the collective bargaining agreements upon the ground that they were entered into and carried out by the parties under a mutual mistake of law and fact or of law alone regarding the application of the Act to their employment relationship and that the true intention of the parties was thwarted by such mutual mistake.

5. By order dated February 11, 1943 (R. 89-93),\* Judge Simon H. Rifkind struck out all petitioner's affirmative defenses as insufficient in law but allowed the counterclaim for reformation of the collective bargaining agreements to stand for trial.

6. Trial was had before Judge Harold P. Burke in March, 1943. At the trial, petitioner, deeming the issue of coverage foreclosed by this Court's decision in *Kirschbaum v. Walling*, 316 U. S. 517 (because the greater part of the rentable area of both buildings was occupied by tenants producing goods for commerce) stipulated that respondents were covered by the Act during their employment. It was also stipulated that the proof should be limited to the case of the respondent Ira Adams and if he was found entitled to recover, then all respondents should recover on the basis of certain specified amounts for overtime compensation under the Act.

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\* All references are to folios of the Record for greater particularity.

7. An opinion and findings of fact and conclusions of law dated November 11, 1943 (R. 1138-1170) sustaining respondents' claims were filed by Judge Burke and pursuant thereto judgment (R. 1171-1176) was entered against petitioner on November 27, 1943 in favor of respondents for the sum of \$3,947.02, consisting of \$1,498.76 overtime compensation, \$1,498.76 liquidated damages, \$800 attorneys' fee (stipulated as reasonable in event of respondents' recovery) and \$149.50 costs and disbursements.

8. As disclosed by Judge Burke's opinion (R. 1168), judgment against petitioner's counterclaim for reformation and in favor of respondents was rested on the ground that "the evidence falls short of establishing clearly that the Union representative shared the same belief (i. e., that the Act did not apply) and that the alleged mutual mistake resulted in a contract which failed to express the actual intent of the parties."

9. An appeal was thereupon taken to the United States Circuit Court of Appeals for the Second Circuit by petitioner from both the final judgment and from the intermediate order striking the various affirmative defenses, excepting the defense of arbitration which had become moot because of the trial. On July 18, 1944, the Circuit Court affirmed the judgment and granted an additional allowance of \$500 to respondents' attorneys as counsel fees for the appeal (R. pp. 399-403).

10. On July 24, 1944, the Second Circuit Court entered its order upon the stipulation of the parties staying and withholdings its mandate in this case for a period of thirty days pending this application by your petitioner for a writ of certiorari to said Court.

### **Jurisdiction**

11. The jurisdiction of this Court is based on Section 240(a) of the Judicial Code, 28 U. S. C. 347 as amended by the Act of February 13, 1925.



### **Facts as Established by the Findings**

12. The relevant findings of the Trial Court are substantially as follows (both paraphrased and quoted findings being assigned their actual numbers in parentheses):

(3-4) Throughout plaintiffs' employment there existed certain master collective bargaining agreements between The Realty Advisory Board on Labor Relations, Inc., an organization of building owners and managing agents in the Borough of Manhattan, New York City, and Local 32-B, Building Service Employees' International Union, A. F. of L., covering terms and conditions of employment of building service employees in defendant's two loft buildings and other signatory buildings (R. 1139-1140). These collective agreements were the so-called Mayor's Board of Survey Agreement which, as supplemented by various interim arbitration awards, was effective from March 15, 1936 to April 23, 1939 and the Sloan Agreement which, also supplemented by an arbitration award known as the Sloan Award, was effective from April 24, 1939 to April 20, 1942 (R. 1140). (Complete copies of these agreements are included in the separate binder of exhibits stipulated to be handed up to the Circuit Court on argument of the appeal (R. 1186-1188) as Exhibits A-1 to A-6 inclusive and Exhibits B and B-1.)

(5-6) Plaintiffs were at all times members of Local 32-B (sometimes called the Union herein) and "were employed by and actually worked for the defendant on the basis of a specified regular maximum work-week at a specified regular weekly wage and were paid at the rate of time and one-half for all hours worked in excess of such regular maximum work-week. Pursuant to the collective bargaining agreements plaintiff Ira Adams was employed by and actually worked for the defendant during the following periods on the following basis: October 24, 1938 to April 27, 1939, \$23 per week for a 48 hour week; April 28, 1939 to October 24, 1940, \$24 per week for a 47 hour week; October 25, 1940 to February 26, 1942, \$25 per week for a 47 hour week" (R. 1141-1142).

(21) "The form of the collective agreements, particularly the Madden Award and the Sloan Agreement indicate that the collective agreements were made by the Union as agents for its members including the plaintiffs herein. The plaintiffs, as to wages and hours and working conditions, were bound by the terms of said agreements" (R. 1150).

(7) In loft buildings signatory to the Sloan Agreement, of which there were about 700 in the Borough of Manhattan employing about 3500 employees, the percentage of space occupied by tenants engaged in production of goods for commerce varied from a small percentage to one hundred per cent (R. 1142-1143).

(8) "During the negotiations of the so-called McGrady Agreement in the Garment Center in December 1938 through February 1939, there was brief discussion between the negotiating committees of the Union and representatives of associations representing building owners regarding the possible application of the Fair Labor Standards Act of 1938 to building service employees in loft and office buildings operating under collective agreements made between the Union and said associations and the Realty Advisory Board. Such discussions were incidental to other questions involved and the matter was but casually treated and summarily dismissed. The negotiating committee of the Union in those discussions was substantially the same committee which negotiated the Sloan Agreement with Realty Advisory Board. Some of the members of the Realty Advisory Board negotiating committee in the Sloan Agreement negotiations were also members of the negotiating committee of the associations in the McGrady agreement negotiations" (R. 1143-1144).

(9) "The Sloan Agreement was negotiated between March 1939 and July 1939. During the negotiations there was little or no discussion of the possible application of the Act to the employment relationship involved in said negotiations" (R. 1145).

(10) "During the period covered by the complaint no claim was ever made by the Union to the Realty

Advisory Board, or to the defendant, or to the arbitrator, or to the Impartial Chairman, that the question of benefits under the Act should be arbitrated under the provisions of the collective Agreements nor that the said agreements should be adjusted to comply with the requirements of the Act" (R. 1145-1146).

(11) "Between June 25, 1938, when the Act was approved, and June 1, 1942, no claim was ever made by the Union to the defendant or its managing agent that the members of the Union employed in the two buildings were entitled to the benefits of the Act or to any other or different rate of pay than that prescribed by the collective bargaining agreements" (R. 1146).

(12) "Between the date of approval of the Act and July 22, 1942, when this action was commenced, no claim was ever made by any of the plaintiffs that they were entitled to benefits of the Act in any respect or to any different rate of pay than that prescribed by the collective agreements" (R. 1145-1146).

(13) "The plaintiffs were paid weekly and signed weekly pay rolls acknowledging payment in full for all hours worked during each week when employed by the defendant" (R. 1146).

(15) "No provision was made by the defendant and its managing agents in its annual estimates of the cost of operation and maintenance of said buildings for overtime payments under Section 7 (a) of the Act" (R. 1148).

(16) "During the period covered by the complaint the two buildings were operated by the defendant at a loss and were sold at a loss before the commencement of this action" (R. 1148).

(17) "Between October 1938 and July 1939, when the Sloan Agreement was signed, there was no new contractual relationship entered into by the parties but merely a continuation of the relationship as modified and fixed by the Madden Award" (R. 1148).

(18) "There is no clear and convincing proof that, at the time of the signing of the Sloan Agreement in July, 1939, and at the time of the making of the Sloan Award in October, 1940, the parties to those collective bargaining agreements were mutually mistaken as to the applicability of the provisions of the Fair Labor Standards Act to building service employees in loft buildings, such as the plaintiffs" (R. 1149).

### Questions Presented

13. On the basis of the foregoing, petitioner desires this Court to review the following questions:

(a) Whether collective bargaining agreements which provided no express hourly rate of pay but called for a specified regular weekly wage and over-time compensation at the rate of time and one-half for hours in excess of the regular workweek (of 48 and 47 hours in successive periods), were in compliance with Section 7(a) of the Act where the regular hourly rate reasonably to be implied therefrom always exceeded the minimum hourly rate required by Section 6 of the Act.

(b) Whether the collective bargaining agreements and the conduct of respondent employees thereunder in relation to petitioner give rise to an equitable estoppel against the recovery of liquidated damages, attorneys' fees and costs by respondents. Implicit in this question, whether any concept of public policy embedded in the Act or in the law generally precludes the raising of such an estoppel.

(c) Whether allowing respondent employees to recover liquidated damages, attorneys' fees and costs under all the circumstances of this case produces a result so harsh and grossly inequitable as to constitute an application of Section 16(b) of the Act that

is violative of due process under the Fifth Amendment.

(d) Whether the finding of the Trial Court, affirmed by the Circuit Court, that there is no clear and convincing proof of mutual mistake in the making and carrying out of the collective bargaining agreements and of consequent frustration of the true intention of the parties, is not clearly erroneous.

(e) Whether, as held by the Second Circuit Court of Appeals, "reformation of a contract which in terms violated a remedial statute would tend to frustrate the administration of the Act and contravene its policy" (R. p. 403).

### **Reasons in Support of Petition**

14. There are involved in this case novel questions in the construction and application of the Fair Labor Standards Act of 1938 not yet reviewed by this Court or, in the case of two questions presented, not so clearly and directly settled as to dispose of a mass of litigation which has arisen under the Act.

(a) This Court has not yet reviewed the question whether employees who have accepted the full benefits of collective bargaining agreements freely and fairly negotiated and made no claims or demands under the Act during the life of such agreements, particularly under circumstances tending to show that both employees and employers believed in good faith that the Act did not apply to their employment relationship, can still recover liquidated damages, attorneys' fees and costs under Section 16(b) of the Act. In other words, this Court has not reviewed a case where the defense has been made that circumstances such as here presented give rise to an

estoppel against claims for liquidated damages under Section 16(b) of the Act as distinguished from overtime compensation under Section 7(a).

(b) This Court has not yet reviewed the question whether it would be contrary to the policy of the Act to reform a collective bargaining agreement entered into and carried out under a mutual mistake regarding application of the Act to the employment relationship involved, in order to carry out the true intention of the employer and employees to make a lawful agreement for a specified regular weekly wage.

(c) In *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572, 581, and *Warren-Bradshaw Co. v. Hall*, 317 U. S. 88, 93, this Court, in construing individual employment contracts as distinguished from collective agreements with the long-established bargaining history here involved, refused to find by implication an hourly rate which would have sustained the employment as in compliance with the Act. However, there are critical differences between the facts in the above mentioned cases and the present one. In the *Missel* case, this Court said at page 581:

“But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law.”

Of course, in the present case there was a definite contractual ceiling of 48 or 47 hours on the week's work with rate and one-half for hours worked in excess of the regular workweek. The minimum compensation always exceeded the Act's standard and could never be less in any event.

In *Warren-Bradshaw*, it is clear, as pointed out by Judge Hutcheson in the Circuit Court's opinion (124 F. (2d) 42, 44) "that they (the employees) worked on a straight hourly basis. \* \* \*" In the present case, respondents worked on a regular weekly basis. Moreover, the provision for special overtime compensation for hours worked in excess of the regular workweek implied that compensation for any legal overtime within the regular workweek was absorbed in the regular weekly wage. This implication is fortified by respondents' regular weekly acknowledgments of full payment for all hours worked and their failure currently to demand additional compensation.

(d) Likewise, in *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572, it was held that the imposition of liquidated damages under Section 16(b) of the Act did not violate due process. It does not credit the function and fair tradition of this Court to suggest that this holding was meant to apply to every possible set of circumstances irrespective of the harshness and inequity of the result. That the holding is limited to the specific facts of the *Missel* case is borne out by the Court's detailed exposition (p. 582) of the employer's reasonable opportunity to determine in advance that his employee was covered by the Act. Until June 1, 1942, some months after respondents' employment by petitioner had ended, coverage in this case was distinctly doubtful. Indeed, the great weight of authority was against it. *Fleming v. Arsenal Building Corporation*, 125 F. (2d) 278, 281.

15. The widespread public interest and great importance of these questions to real estate owners and their building service employees is manifest. The decision of this Court on June 1, 1942, in *Kirschbaum v. Walling*, 316 U. S. 517, came as a distinct surprise and shock to independent landlords of loft buildings all over the country. Radical adjustments were necessary in many cases and were promptly made for the future. However, such

adjustments could not dispose of the huge existing liabilities for overtime compensation and equal amounts of liquidated damages which fell upon real estate owners still suffering in many sections of the nation from the long depression. In New York City alone, the retroactive liability of loft building owners was estimated to approximate twelve million dollars. To the knowledge of petitioner's attorneys, there are hundreds of cases pending in the Federal and State Courts in New York City at various stages of litigation involving the same or similar issues as those now presented by this case. A large number of cases have been stipulated to abide the ultimate decision in this case or in another case, *Greenberg v. Arsenal Building Corp. and Spear & Co. Inc.*, also decided by the Second Circuit Court of Appeals at the same time as the present case, where additional questions of law are presented as well as similar ones involving other collective bargaining arrangements. (A petition for writ of certiorari will soon be presented in the *Greenberg* case). The fact that there were 700 loft buildings in the Borough of Manhattan, New York City, where building service employment was governed by the collective bargaining agreements peculiar to this case, demonstrates the importance of this litigation.

Moreover, it is possible that the retroactive liabilities will not be limited to loft buildings but will extend to office buildings,—at least those buildings where, though no physical production actually occurs, the tenants administer and supervise production elsewhere. In *Rucker v. First National Bank*, 138 F. (2d) 699 (C. C. A. 10th, 1943), it was held in such a case that the building service employees are not covered by the Act. This Court denied certiorari. 321 U. S. 769. But in *Borella v. The Borden Company*, F. (2d) (C. C. A. 2d, decided July 28, 1944), a different result has been reached. If the *Borella* doctrine is ultimately sustained, the existing retroactive liabilities of landlords of loft and office buildings in New York City and, in fact, throughout the



country, will be substantially increased. The final and authoritative settlement by this Court of the questions here presented will necessarily be conclusive of a great mass of pending and threatened litigation.

16. Finally, this case squarely presents questions as to the validity and effectiveness of collective bargaining agreements negotiated and carried out during a period when the application of the Act to employments of the character here involved was not seriously regarded by reasonable men, laymen, lawyers and courts alike. If the decision of the courts below in this case is to stand, "the process of collective bargaining is turned into a scrap of paper" with results that "cannot be joyfully regarded." (Rifkind, J. on the motion to strike the affirmative defenses and counterclaims in this case, R. 87-89.)

### Conclusion

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Honorable Court a full and complete transcript of the record and all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet, and the circumstances of the case require, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

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Dated: August 22, 1944.